No. 3667

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

THE UNITED STATES OF AMERICA,
Plaintiff in Error,

vs.

COLUMBIA & NEHALEM RIVER RAILROAD COMPANY,
Defendant in Error.

Brief of Defendant in Error

Upon Writ of Error to the United States District Court for the District of Oregon

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Attorneys for Defendant in Error.

LANE-MILES STANDISH CO.

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LIST OF AUTHORITIES CITED IN THIS BRIEF

STATEMENT OF THE CASE

The pertinent facts in this case are stated very clearly in the Trial Court's opinion (Transcript p. 17), and in the statement of the case contained in the brief of the plaintiff in error and we desire to add very little thereto. It is to be borne in mind that the defendant in error, although a common carrier of freight under the law of Oregon, was essentially and primarily a logging road, constructed and operated for that purpose only and it had or maintained no equipment of any kind in which freight could be shipped in intra or interstate commerce. Aside from the engines, the defendant had no freight cars other than three flat cars and one stock car. (Transcript, p 59.) Logs constituted 95 per cent of the freight taken over defendant's lines. Not over one per cent of the freight which is picked up by the S. P. & S. at Kerry and which has been transported over the defendant's line is shipped outside of the State of Oregon. The shippers on defendant's line deal directly with the S. P. & S. and in bringing the bills of lading to Kerry and placing them in the box alongside the right of way of the S. P. & S., the defendant acted in all cases only as a messenger of the consignors (Transcript, p. 71). There is no town at Kerry where the dispatcher's office is and

there are no stations on defendant's line or any agents at any place other than Kerry. The dispatcher lived in a room above his office and whether he was on duty or not, he spent his evenings in the office reading the paper and, as testified to by him, he would not consider the office closed or that he was off duty until he locked the office and went upstairs to bed (Transcript, pp. 66, 67, 80). The ordinary movement of logging trains over defendant's line took place between seven A. M. and six P. M. (Transcript, p. 73). During the year 1919, as testified to by Mr. Cochran, auditor of defendant, trains could have been tied up so that no further dispatching was necessary on an average not later than 8:00 or 8:30 P. M.

ARGUMENT

I.

As stated in the brief of plaintiff in error, on pages 9 and 10:

> "Errors complained of by the plaintiff in error are all of them general in nature and regard the sufficiency of the findings to support the judgment, and the failure of the evidence to sustain the findings made by the court."

At the conclusion of the case, the plaintiff orally moved the court for a judgment upon the testimony

on the ground that the uncontradicted testimony supported the allegations set forth in the complaint (Transcript, p. 80), which motion the court overruled and this is the first error specified by plaintiff in error (Transcript, p. 42). No exception was asked by plaintiff and none allowed by the court to this ruling. Assignments of Error II., III., IV., V. and VI. are to the effect that the Findings of Fact as made by the court are not sustained by the evidence. Assignments of Error VII., VIII., IX., X. and XI. are to the effect that the Findings of Fact as made by the court are not sustained by law and Assignments of Error XII. to XXV. inclusive are for the reason that the court declined to make Findings as requested by the plaintiff, which special Findings were not presented to the court until December 13, 1920, while the Findings as made by the court and the judgment were entered on August 16, 1920 (Transcript, p. 81). At the time the trial court made its Findings of Fact and Conclusions of Law no exception was asked or allowed thereto by the plaintiff.

It is the contention of the defendant that on this state of the record there is nothing for this court to review. As to each of the causes of action set forth in the complaint, the trial court made a general Finding that the defendant was not at any of the times mentioned in the complaint engaged in interstate commerce and, as a conclusion of law, that the defend-

ant is not subject to the Act of Congress mentioned in the complaint and that the plaintiff was not entitled to recover upon any of its causes of action (Transcript, pp. 24, 25).

The plaintiff in error in its brief cited Section 172 of Oregon Laws and also a number of decisions of the Supreme Court of Oregon as to the practice to be followed in a trial before the court without the intervention of a jury but this section of the Oregon Laws and the cases cited in plaintiff's brief and relied upon by it are absolutely without any application to this case or to any trial by a Federal Court without a jury.

These matters are specifically covered by Statutes of the United States.

Section 649 of the Revised Statutes is as follows:

> "Issues of fact in civil cases in any Circuit Court may be tried and determined by the court, without the intervention of a jury, whenever the parties, or their attorneys of record, file with the clerk a stipulation in writing waiving a jury. The finding of the court upon the facts, which may be either general or special, shall have the same effect as the verdict of a jury."

Section 700 of the Revised Statutes provides:

> "When an issue of fact in any civil cause in a Circuit Court is tried and determined by the court

> without the intervention of a jury, according to Section 649, the rulings of the court in the progress of the trial of the cause, if excepted to at the time, and duly presented by a bill of exceptions, may be reviewed by the Supreme Court upon a writ of error or upon appeal; and when the finding is special the review may extend to the determination of the sufficiency of the facts found to support the judgment."

Section 649 provides that the Finding of the Trial Court may be either general or special and that whether general or special Findings are made, they shall have the same effect as the verdict of a jury; while Section 700 provides that the rulings of the court in the progress of the trial, if excepted to at the time and duly presented by a bill of exceptions, may be reviewed by the Appellate Court and when the Finding is special the review may extend to the determination of the sufficiency of the facts found to support the judgment.

In this case the court made a general Finding as to each of the causes of action alleged in the complaint to the effect that the defendant was not engaged in interstate commerce and hence this Finding has the same effect as the verdict of a jury would have had, and this court will not examine the evidence for the purpose of determining whether the facts as found are warranted by the evidence. There were no ex-

ceptions taken during the progress of the trial and as the court made a general Finding, there is absolutely nothing for this court to review or pass upon. Under Section 700 of the Revised Statutes, even if the Finding of the court had been special, the only thing that this court, under the present state of the record would be called upon to determine would be whether or not the facts as found by the Trial Court were sufficient to support the judgment. There is no doubt but that the Findings of the court were general Findings and they were so considered by the Trial Court (Transcript, p. 81).

On the trial of an action at law without a jury, it is discretionary with the court to make either general or special Findings of Fact and it is not error for the court to refuse to make special Findings.

Miller vs. Life Ins. Co., 12 Wall. 285-297.

Insurance Co. vs. Folsom, 18 Wall. 237-249-250.

British Queen Min. Co. vs. Baker Silver Min. Co., 139 U. S. 22.

State Nat. Bk. vs. Smith, 94 Fed. 605.

Wright vs. Bragg, 96 Fed. 727-731.

Berwind-White Coat Min. vs. Martin, 124 Fed. 313-314.

School Dist. No. 11 vs. Chapman, 152 Fed. 887-894.

In the case of Insurance Co. vs. Folsom cited above, the Circuit Court refused the request of counsel to make any special Findings of Fact and counsel for defendant then and there took an exception to the refusal of the Trial Court to make special Findings. In discussing Section 649 of the Revised Statutes, the court said:

> "Propositions of fact found by the court, in a case where the trial by jury is waived, as provided in the Act of Congress, are equivalent to a special verdict, and the Supreme Court will not examine the evidence on which the Finding is founded, as the Act of Congress contemplates that the finding shall be by the Circuit Court; nor is the Circuit Court required to make a special Finding, as the act provides that the Finding of the Circuit Court may be either general or special, and that it shall have the same effect as the verdict of a jury."

The same rule is laid down in School Dist. No. 11 vs. Chapman, 152 Fed. 887-894, where the court said:

> "When the trial is to the court, without the intervention of a jury, whether the Finding shall be general or special rests in the discretion of the court in like manner as it rests in its discretion, when the trial is with a jury, to require that the verdict be general or special. The Statute (Rev. St. U. S. Sec. 649—U. S. Comp. St. 1901, p. 525),

> declares that the Finding 'may be either general or special,' but it does not give to one of the litigants the right to determine which it shall be."

All of the authorities cited above are of the same tenor and hold that it was discretionary with the Trial Court to make either general or special Findings and that error cannot be predicted upon the court's refusal to make special Findings of Fact even though the request for special Findings is made during the progress of the trial. With much more reason, therefore, can it be said that the plaintiff in this case cannot predicate error upon the refusal of the court to make the special Findings which were presented to the court and upon which the court was asked to find several months after the Findings had been made and the judgment entered. The fact that the plaintiff took different orders of the court allowing it time within which to file objections to the Findings as made and make requests for other and different Findings avails the plaintiff nothing.

No question is presented for review by the Appellate Court where a jury is waived and the Finding of the court was general and no bills of exception were taken to the rulings of the court during the progress of the trial.

Hughes County vs. Livingston, 104 Fed. 306.

National R. Co. of Mexico vs. O'Leary, 126 Fed. l. c. 363.

York vs. Washburn, 129 Fed. 564-566.

Jackson vs. Mutual Life Ins. Co., 186 Fed. 447-449.

In the case of Hughes County vs. Livingston cited above, the court said on page 319 of the opinion:

> "Where a jury is waived, and there is testimony raising a controversy, and the court finds generally for one side or the other, the losing party has no redress on error, except for the wrongful admission or rejection of evidence."

To the same effect is York vs. Washburn, 129 Fed. 564, in which case the court cited a large number of authorities on this question and in its opinion, on page 566, said:

> "That which the record discloses is nothing more than a general Finding of all the issues in favor of defendant, but, whether the Finding be general or special, it has the same effect as the verdict of a jury, and, in the circumstances in which it was given, is conclusive, and prevents any inquiry in this court as to whether it is sustained by the evidence. Norris vs. Jackson, 9 Wall. 125, 19 L. Ed. 608; Martinton vs. Fairbanks, 112 U. S. 670, 5 Sup. Ct. 321, 28 L. Ed.

862; Lehnen v. Dickson, 148 U. S. 71, 13 Sup. Ct. 481, 37 L. Ed. 373; Dooly vs. Pease, 180 U. S. 126-131, 21 Sup. Ct. 329, 45 L. Ed. 457; Wilson vs. Merchants Loan & Trust Co., 183 U. S. 121-127, 22 Sup. Ct. 55, 46 L. Ed. 113; Mercantile Trust Co. vs. Wood, 8 C. C. A. 658, 60 Fed. 346; Walker vs. Miller, 8 C. C. A. 331, 59 Fed. 869; Hughes County vs. Livingston, 43 C. C. A., 541-555, 104 Fed. 306; Barnard vs. Randle, 49 C. C. A. 177, 110 Fed. 906."

Where a jury is waived and the court finds generally, nothing is open to review by the losing party under writ of error except rulings of the court in the progress of the trial and that phrase does not include general Findings of the court nor Conclusions of the court embodied in such general Findings.

Norris vs. Jackson, 9 Wall. 125.
Miller vs. Insurance Co., 12 Wall. 285-297.
Dirst vs. Morris, 14 Wall. 484.
Insurance Co. vs. Folsom, 18 Wall. 237-248.
Cooper vs. Omohundro, 19 Wall. 65.
Lehnen vs. Dickson, 148 U. S. 71-73.
City of Key West vs. Baer, 66 Fed. 440-442.
Distilling & Cattle Feeding Co. vs. Gottschalk Co., 66 Fed. 609.

A very clear statement of the effect of both general and special Findings in a trial by the court is con-

tained in the case of Lehnen vs. Dickson, cited above, and we quote from page 73 of the opinion as follows:

> "Sections 648 and 649 of the Revised Statutes, while committing generally the trial of the issues of fact to a jury, authorize parties to waive a jury and submit such trial to the court, adding that 'the Finding of the court upon the facts, which may be either general or special, shall have the same effect as the verdict of a jury.' But the verdict of a jury settles all questions of fact. As said by Mr. Justice Blatchford, in Lancaster vs. Collins, 115 U. S. 222, 225: 'This court cannot review the weight of the evidence, and can look into it only to see whether there was error in not directing a verdict for the plaintiff on the question of variance, or because there was no evidence to sustain the verdict rendered.' The Finding of the court, to have the same effect, must be equally conclusive and equally removed from examination in this court the testimony given on the trial. Insurance Co. vs. Folsom, 18 Wall. 237; Cooper vs. Omohundro, 19 Wall. 65. Further, Section 700 provides that 'when an issue of fact in any civil cause in a Circuit Court is tried and determined by the court without the intervention of a jury, according to Section 649, the rulings of the court in the progress of the trial of the cause, if excepted to at the time, and duly presented by a Bill of Exceptions, may be reviewed by the Supreme Court upon a writ of error or upon appeal; and when the Finding is special,

> the review may extend to the sufficiency of the facts found to support the judgment.' Under that, the rulings of the court in the trial, if properly preserved, can be reviewed here, and we may also determine whether the facts as specially found support the judgment; but if there be no special findings, there can be no inquiry as to whether the judgment is thus supported. We must accept the general Finding as conclusive upon all matters of fact, precisely as the verdict of a jury. Martinton vs. Fairbanks, 112 U. S. 670."

Two very clear and instructive cases as to the proper method of saving questions to be reviewed by the Appellate Court, where a trial is had before the court without a jury, are those of Mercantile Trust Co. vs. Wood, 60 Fed. 346, and Humphreys vs. Third National Bank, 75 Fed. 852.

Judge Sanborn of the Eighth Circuit, in Mercantile Trust Co. vs. Wood, said:

> "The only question the special Finding presents that would not be presented by a general Finding is whether or not, in any view, the facts found in it are sufficient to support the judgment. With the single exception of this question, which is presented by the special Finding itself, there are only two methods by which questions of law can be so presented to the court that tries the

facts that this court can review them by writ of error. These methods are, first, by seasonable objections and exceptions to the ruling of the court upon the admission or rejection of evidence, and, second, by requesting the court, before the trial is ended, to make declarations of law, and excepting to its refusal to do so, and to its declarations of law, if any, that do not accord with the propositions asked, in exactly the same way as instructions to a jury would be requested, and the rulings of the court giving or refusing them would be excepted to, if the trial was before a jury. The Finding of the court, whether general or special, performs the office of a verdict of a jury. When it is made and filed, the trial is ended. Exceptions to the Finding, or to statements of legal conclusions contained in it, or in an opinion in which it is contained, or in an opinion filed with it, avail nothing. They are as futile as exceptions to the verdict of a jury. When a case comes to this court upon a writ of error, this is a court for the correction of the errors of the court below solely. To enable us to review these errors in a case tried by the court it must appear that the legal propositions on which they rest were presented to that court and ruled upon before the trial ended, unless they are involved in the single question whether or not the facts found in a special Finding are sufficient to support the judgment. It is, in the words of the Statute, 'the rulings of the court in the progress of the trial of the case,' and these only, that

we are authorized to review, unless such rulings are involved in the single question we have mentioned. Clement vs. Insurance Co., 7 Blatchf. 51, 53, 54, 58 Fed. Cas. No. 2882; Walker vs. Miller, 59 Fed. 869; Bowden vs. Burham, Id. 752; Norris vs. Jackson, 9 Wall. 125, 127; Insurance Co. vs. Folsom, 18 Wall. 237, 249; Cooper vs. Omohundro, 19 Wall. 65, 69; Martinton vs. Fairbanks, 112 U. S. 670, 5 Sup. Ct. 321; Lehnen vs. Dickson, 148 U. S. 71, 13 Sup. Ct. 481.

"No requests for any declarations of law were made in this case, and the only question raised by the proceedings at the close of the trial is whether or not the facts found by the special Finding contained in the opinion of the court are sufficient to sustain the judgment."

The opinion in the case of Humphreys vs. Third National Bank, 75 Fed. 852, was written by Judge Taft and, among other things, he said:

"The Finding in favor of the plaintiff below was a Finding which involved mixed questions of law and fact, and it was general in its form. It is well settled that in such a case nothing is open to review in this court except the rulings of the Trial Court in the progress of the trial, and that such rulings do not include the general Finding of the Circuit Court, which performs the office and has the effect of a verdict of a jury; that is to say, it is conclusive as to the facts found. The

strictness with which this rule is enforced is clearly set forth in the opinion of Judge Lurton speaking for this court in Insurance Co. vs. Hamilton, 22 U. S. App. 386, 11 C. C. A. 42, and 63 Fed. 93, where all the decisions of the Supreme Court upon the subject are fully reviewed. This practice in the Federal Courts of Appeal differs from that in the State Courts of this circuit where it is open to counsel on writ of error by exception to a general Finding to raise the question in the Appellate Court of the sufficiency of the evidence as a matter of law to sustain such Finding. We fear that this difference in the practice is not sufficiently well known to counsel, and we think that their attention should be especially directed to the very technical and severe rule of the Federal Appellate Courts in this respect. When a party in the Circuit Court waives a jury, and agrees to submit his case to the court, it must be done in writing; and if he wishes to raise any question of law upon the merits in the court above he should request special Findings of Fact by the court, framed like a special verdict of a jury, and then reserve his exceptions to those special Findings, if he deems them not to be sustained by any evidence; and if he wishes to except to the conclusions of law drawn by the court from the facts found he should have them separately stated and excepted to. In this way, and in this way only, is it possible for him to review completely the action of the court below upon the merits. A general Finding in favor of the party is treated as a

general verdict. A general verdict cannot be excepted to on the ground that there was no evidence to sustain it. Such a question must be raised by a request to the coutr to direct a verdict on the ground of insufficiency of the evidence. If the views which the court takes of the law are deemed to be prejudicial to a party, he is required to except to the charge at the time that it is delivered, indicating those parts of it to which he objects. Where a cause is submitted to the court, however, the court cannot, in the nature of things, charge itself, and therefore no opportunity is presented to the party objecting to the views which the court entertains of the law to take his exceptions, unless he procures special Findings of Fact to be made and special conclusions of law to be drawn therefrom. We regret that in a number of cases brought before us the submission of a law case to a court upon stipulation has proved a trap to counsel in this court, and we say what we have with the hope that it may direct the attention of those who shall bring cases here in the future to the fact that great care must be taken in the preparation of a case for error proceedings, when no jury intervenes. The result in this case is that the general Finding in favor of the plaintiff cannot be disturbed, because it involves a mixed question of law and fact, and is not reviewable here. We can only examine the rulings of the court on the evidence as shown in the bill of exceptions."

After a careful examination of the authorities, we have been unable to find where the doctrines enunciated by the above cited cases have been in any way modified or overruled. In fact, the two sections of the Revised Statutes governing this matter are plain and unambiguous. Under neither Statute has this court the right to review the evidence and in a case where the Finding of the court is special, the Appellate Court will only examine the Findings for the purpose of determining whether or not they are sufficient to support the judgment. The Finding of the Trial Court in this case was that the defendant was not engaged in interstate commerce and this fact being true, the case of the Government thereby fell of its own weight.

On page 27 of plaintiff's brief, it complains that the Findings of Fact made by the court are mere Conclusions of Law and therefore do not sustain the judgment. The Findings of the court that the defendant is not engaged in interstate commerce are Findings of Fact under the decisions of the Supreme Court of the United States. It is true that whether or not the railroad is engaged in interstate commerce may be a mixed question of law and fact but the determination of this question is nevertheless based upon the facts. This doctrine is laid down in Railroad Commission of Ohio vs. Worthington, 225 U. S. 101 and Southern Pacific Co. vs. State of Arizona, 249 U. S. 472, and also in a case decided by the Supreme Court

of the State of Oregon, where practically all of the decisions of the United States Supreme Court are reviewed, the case being Service vs. Sumpter Valley Railway Co., 88 Ore. 554, 576.

In the case of Southern Pacific Co. vs. State of Arizona, Mr. Justice Clarke, who wrote the opinion, said:

> "Whether a shipment was at a given time interstate commerce is a question of fact, Railroad Commission of Ohio vs. Worthington, 225 U. S. 101, 108; 32 Sup. Ct. 653, 656, L. Ed. 1004; * * *"

The case of Service vs. Sumpter Valley, Ry. Co., 88 Ore., was a trial before a jury and the question at issue was whether or not certain shipments were intra-state or interstate commerce and under the evidence produced the court left the determination of this fact to the jury on the ground that it was a question of fact to be passed upon by them and on page 577 of the opinion, the following language was used:

> "In our judgment there is at least some testimony to be considered on both sides of the question about interstate commerce; and, however, great the preponderance in its favor as estimated by the defendant, we cannot say that its showing is so conclusive as rightly to call from the Trial Court a peremptory direction to the jury to find against the plaintiff on that point."

We submit, therefore, that under the two sections of the Revised Statutes, and the authorities above cited, the provisions of the Oregon Law and the decisions of the State Supreme Court as to the manner of preserving and presenting questions of law to be reviewed in the Appellate Court, have no bearing whatever on this case and further that on the record in this case this court has nothing to do other than to affirm the judgment of the Trial Court without examining into the issues of the case.

II.

The defendant was not engaged in interstate commerce under the facts of this case.

Coe vs. Errol, 116 U. S. 517.

Gulf, C. & S. F. R. Co. vs. Texas, 204 U. S. 403.

N. Y. Cent. Ry. Co. vs. Mohney, 252 U. S. 152.

U. S. vs. Geddes, 131 Fed. 452.

Settle vs. Baltimore & O. S. W. R. Co. 249 Fed. 913.

Chicago M. & St. P. R. Co. vs. Iowa, 233 U. S. 334.

So. Pac. Co. vs. Arizona, 249 U. S. 472.

Public Utilities Commission for State of Kansas vs. Landon, 249 U. S. 236.

It must be borne in mind that in most of the cases dealing with the question as to whether or not a certain shipment is intra-state or interstate, it is conceded that the carrier is engaged in interstate commerce and in a great majority of cases, the railroad in question issues through bills of lading and has traffic arrangements and agreements with other railroads for the division of charges. No such state of facts exist in this case. The defendant issued no through bills of lading, had no schedule of through rates or traffic arrangements with any other road and had no conventional agreement for the division of charges and was treated by the S. P. & S., the only railroad connecting with the defendant's line as an ordinary shipper and was charged demurrage on cars the same as any other shipper would be. It is the contention of the defendant in this case and was so decided by Judge Bean that in transporting a shipment from a point on the defendant's line to Kerry, the defendant was acting simply as a forwarding agent and that any shipment that was destined for points outside the State of Oregon did not take on an interstate character until the shipper made arrangements with the S. P. & S. for shipment from Kerry to the point of destination. The defendant is essentially a logging railroad and, as shown by the statement of facts in the bill of exceptions (Transcript, p. 70), it was not originally contemplated that the road should be a common carrier but it was found necessary, in

order to secure rights of way, to incorporate as a common carrier of freight and under the law of the State of Oregon, it was required to accept any freight shipments that were offered to it, but it had a perfect right to limit its carriage and its responsibility to its own line and this it did. The Statutes of the State of Oregon which impose the duty of transporting all freight offered to defendant upon payment of reasonable compensation therefor, are Sections 7080 and 7081 of Olson's Oregon Laws, which sections are as follows:

> "Any corporation organized for the purpose of opening or operating any gold, silver or copper vein or lode, or any coal or other mine; or any marble, stone or other quarry; or for cutting or transporting timber, lumber or cordwood, or for the manufacture of lumber shall have the right to construct and operate railroads, skid roads, tramways, chutes, and flumes between such points as may be indicated in their articles of incorporation, and shall have a right to enter upon any land between such points for the purpose of examining, locating and surveying the line of such railroads, skid roads, tramways, chutes and flumes, doing no unnecessary damage thereby, and such corporation shall have power to appropriate so much of said land as may be necessary for the same, not exceeding sixty feet in width, and may maintain an action for the appropriation thereof in the manner and form as

by law provided by any railway, macadamized road, plank road, clay road, canal or bridge, and with like effect.

"Any such railroads, skid roads, tramways, chutes, flumes, shall be deemed to be for public benefit, and any such railroad so constructed, and operated shall afford to all persons equal facilities for the transportation of freight upon payment or tender of reasonable compensation therefor, but said railway shall not be required to carry passengers; and any such skidway, tramway, chute or flume shall afford to all persons equal facilities in the use thereof for the purpose to which they are adapted, upon tender or payment of the reasonable compensation for such use."

These sections of the Statute are declaratory of the common law duty of a common carrier.

In the case of Myrick vs. Mich. Cent. R. Co. 107 U. S. 102, Mr. Justice Field said on page 106 of the opinion:

"A railroad company is a carrier of goods for the public, and, as such, is bound to carry safely whatever goods are entrusted to it for transportation, within the course of its business, to the end of its route, and there deposit them in a suitable place for their owners or consignees."

There is no law, state or federal, that could require the defendant to assume any responsibility for any carriage other than over its own lines and it had a perfect right so to limit its business.

In reading the decisions on this question, one is struck forcibly with the fact that in determining whether or not a particular shipment is interstate, all of the surrounding facts and circumstances are taken into consideration and, as we have stated above, the determination of this question is an issue of fact. The line of demarcation is not always free from difficulty as pointed out in the late case on this subject of Settle vs. Baltimore & O. S. W. R. Co., 249 Fed. 913, which will be hereafter referred to.

The case of Coe vs. Errol, 116 U. S. 517, which case was cited in Judge Bean's opinion, although a case which arose over the question of whether or not certain logs were taxable, is one that has been frequently cited on this question of interstate shipments both by the Circuit and Supreme Courts, and in the opinion, the court used the following language:

> "When the products of the farm or the forest are collected and brought in from the surrounding country to a town or station serving as an entrepot for that particular region, whether on a river or a line of railroad, such products are not yet exports, nor are they in process of exportation, nor is exportation begun until they are

committed to the common carrier for transportation out of the state to the state of their destination, or have started on their ultimate passage to that state * * *

"It is true, it was said in the case of the Daniel Ball, 10 Wall. 557, 565: 'Whenever a commodity has begun to move as an article of trade from one state to another, commerce in that commodity between the states has commenced.' But this movement does not begin until the articles have been shipped or started for transportation from the one state to the other. The carrying of them in carts or other vehicles, or even floating them, to the depot where the journey is to commerce is no part of that journey. That is all preliminary work, performed for the purpose of putting the property in a state of preparation and readiness for transportation. Until actually launched on its way to another state, or committed to a common carrier for transportation to such state, its destination is not fixed and certain. It may be sold or otherwise disposed of within the state, and never put in course of transportation out of the state. Carrying it from the farm, or the forest, to the depot, is only an anterior movement of the property, entirely within the state, for the purpose it is true, but only for the purpose of putting it into a course of exportation; it is no part of the exportation itself. Until shipped or started on its final journey out of the state its exportation is a matter altogether in fieri, and not at all a fixed and certain thing."

This case in our opinion is controlling of the present case. The defendant in this case simply brought the merchandise to Kerry for shipment, and it was then, and not until then, that it started on its interstate journey. The consignor could have diverted the shipment from Kerry to any point within the state or so far as we are concerned, could have unloaded the same and stored it at Kerry without shipping it further as the car at Kerry was in the control and possession of the consignor and subject to his orders and disposition. It is true that neither the form of the billing nor the intention of the shipper are solely determinative of the question and the rule is laid down in a number of decisions by the Supreme Court that it is the essential character of the commerce that should determine the question.

In the case of Gulf, Col. & S. F. Ry. Co. vs. State of Texas, 204 U. S. 403, a carload of corn was shipped from a point in South Dakota and was billed to Texarkana, Texas. It was the intention of the owners of the corn at all times to ship the same to Goldthwaite, Texas, and the reason same was billed to Texarkana instead of Goldthwaite was that by paying the freight from South Dakota to Texarkana and then the local rate from Texarkana to Goldthwaite, a cheaper freight rate could be secured than by making the through shipment from South Dakota to Goldthwaite. When the carload of corn reached Texarkana, it was

not unloaded but was delivered to another carrier and rebilled from Texarkana to Goldthwaite. The State of Texas brought an action against the railroad company for a penalty and the question to be decided was whether or not the shipment from Texarkana to Goldthwaite, under the facts, was an intra-state or interstate shipment. The Supreme Court held that the shipment was not interstate and, among other things, said:

> "When the Hardin company accepted the corn at Texarkana the transportation contracted for ended. The carrier was under no obligation to carry it further. It transferred the corn, in obedience to the demands of the owner, to the Texas & Pacific Railway Company, to be delivered by it, under its contract with such owner. Whatever obligations may rest upon the carrier at the terminus of its transportation to deliver to some further carrier, in obedience to the instructions of the owner, it is acting not as carrier, but simply as a forwarder. No new arrangement having been made for transportation, the corn was delivered to the Hardin company at Texarkana. Whatever may have been the thought or purpose of the Hardin company in respect to the further disposition of the corn was a matter immaterial so far as the completed transportation was concerned.
>
> "In this respect there is no difference between an interstate passenger and an interstate transportation. If Hardin, for instance, had purchased

at Hudson a ticket for interstate carriage to Texarkana, intending all the while after he reached Texarkana to go on to Goldthwaite, he would not be entitled, on his arrival at Texarkana, to a new ticket from Texarkana to Goldthwaite at the proportionate fraction of the rate prescribed by the Interstate Commerc Commission for carriage from Hudson to Goldthwaite. The one contract of the railroad companies having been finished, he must make a new contract for his carriage to Goldthwaite, and that would be subject to the law of the state within which that carriage was to be made.

"The question may be looked at from another point of view. Supposing a car load of goods was shipped from Goldthwaite to Texarkana under a bill of lading calling for only that transportation, and supposing that the laws of Texas required, subject to penalty, that such goods should be carried in a particular kind of car—can there be any doubt that the carrier would be subject to the penalty, although it should appear that the shipper intended, after the goods had reached Texarkana, to forward them to some other place outside the state? To state the question in other words—if the only contract of shipment was for local transportation, would the state law in respect to the mode of transportation be set one side by a Federal law in respect to interstate transportation, on the ground that the shipper intended, after the one contract of shipment had been completed, to forward the goods to some

place outside the state? Coe v. Errol, 116 U. S. 517-527, 29 L. Ed. 715-718, 6 Sup. Ct. Rep. 475.

"Again it appeared that this corn remained five days in Texarkana. The Hardin company was under no obligation to ship it further. It could, in any other way it saw fit, have provided corn for delivery to Saylor & Burnett, and unloaded and used that car of corn in Texarkana. It must be remembered that the corn was not paid for by the Hardin Company until its receipt in Texarkana. It was paid for on receipt and delivery to the Hardin Company. Then, and not till then, did the Hardin Company have full title to and control of the corn, and that was after the first contract of transportation had been completed.

"It must further be remembered that no bill of lading was issued from Texarkana to Goldthwaite until after the arrival of the corn at Texarkana, the completion of the first contract for transportation, the acceptance by the Hardin Company. In many cases it would work the grossest injustice to a carrier if it could not rely on the contract of shipment it has made, know whether it was bound to obey the state or Federal law, or, obeying the former, find itself mulcted in penalties for not obeying the law of the other jurisdiction, simply because the shipper intended a transportation beyond that specified in the contract. It must be remembered that there is no presumption that a transportation when commenced is to be continued beyond the state limits,

and the carrier ought to be able to depend upon the contract which it has made, and must conform to the liability imposed by that contract."

This case has been cited and approved in practically all of the decisions of the Supreme Court on this subject rendered subsequent to the handing down of this opinion.

The latest decision of the Supreme Court on this question that we have found is that of N. Y. Cent. R. Co. vs. Mohney, 252 U. S. 152. In this case an employee of the railroad had a pass which was good between certain points in the State of Ohio. He desired to make a trip to Pennsylvania due to the death of his mother, and while riding on a train of the Railroad Company and using his pass between Toledo and Cleveland, the train was wrecked and Mohney was seriously injured. His pass contained a release clause which was void under the law of Ohio. He filed suit against the Railroad Company for damages on account of his injuries and the railroad company defended on the ground that Mohney was engaged in an interstate journey and that under the decisions of the Supreme Court of the United States, the release clause was valid. The Court held that although it was Mohney's intention to go on to a point near Philadelphia, Pa., that nevertheless his journey from Toledo to Cleveland was an intrastate journey, the Court basing its opinion on the fact that the only con-

tract between Mohney and the Railroad Company was for transportation from Toledo to Cleveland, the Court saying in its opinion:

> "To what extent the analogy between the shipments of property and the transportation of passengers may profitably be pressed, we need not inquire, for in this case the only contract between the carrier defendant and the plaintiff was the annual pass issued to the latter. This written contract, with its release, is the sole reliance of the defendant. But that contract in terms was good only between Air Line Junction and Collingwood, over a line of track wholly within Ohio, and the company was charged with notice when it issued the pass that the public policy of that state rendered the release upon it valueless. * *
>
> "The contract which the defendant had with its passenger was in writing and was for an intrastate journey, and it cannot be modified by the purpose of Mohney to continue his journey into another state, under a contract of carriage with another carrier, for which he would have been obliged to pay the published rate, or by an intended second contract with the defendant in terms which are not disclosed. The mental purpose of one of the parties to a written contract cannot change its terms. Southern Pacific Co. v. State of Arizona, 249 U. S. 472, 39 Sup. Ct. 313, 63 L. Ed. 713. For these reasons the judgment of the Trial Court was right and should have been affirmed."

In the case of Chicago, M. & St. P. Ry. Co. vs. State of Iowa, supra, cars of coal were shipped from without the state to Davenport, Iowa. The consignee of the coal did not unload same but made application to the plaintiff railroad company for transportation of the coal from Davenport to other points in Iowa. The Court held that the transportation of the coal from Davenport, Iowa, to other points in Iowa would be an intrastate shipment and the fact that the carloads of coal came from points outside the state would not establish such continuity of transportation as to make the reshipment interstate commerce. The Court said:

> "But the fact that commodities on interstate shipments are reshipped by the consignees, in the cars in which they are received, to other points of destination, does not necessarily establish a continuity of movement, or prevent the reshipment to a point within the same state from having an independent and intrastate character. Gulf, C. & S. F. R. Co. v. Texas, 204 U. S. 403, 51 L. Ed. 540, 27 Sup. Ct. Rep. 360; Railroad Commission v. Worthington, 225 U. S. 101, 109, 56 L. Ed. 1004, 1008, 32 Sup. Ct. Rep. 653; Texas & N. O. R. Co. v. Sabine Tram Co., 227 U. S. 111, 129, 130, 57 L. Ed. 442, 449, 450, 33 Sup. Ct. Rep. 229. The question is with respect to the nature of the actual movement in the particular case; and we are unable to say upon this record that the state court has improperly characterized the traffic in question here."

A late case is that of Settle vs. Baltimore & O. S. W. R. Co., 249 Fed. 913, decided by the Circuit Court of Appeals, Sixth Circuit, in 1918. Practically all of the decisions of the Supreme Court are reviewed at length in this opinion. The case involved the question as to the proper rate to be charged for certain shipments of lumber. All of the lumber originated south of the Ohio River and was billed to Oakley, Ohio, a suburb of Cincinnati, and it was the defendant's intention from the time of the original shipments to finally have the lumber shipped and delivered to them at Madisonville, Ohio. The interstate rate was paid from the shipping point to Oakley and upon the arrival of the lumber at Oakley, the same was rebilled to Madisonville in the same state without the lumber being unloaded or in any manner disturbed. The interstate rate from the point of origin to Madisonville in each case exceeded the sum of the interstate rate and the local rate from Oakley to Madisonville and the defendants took the course they did simply for the purpose of getting lower rates. Under these facts, the Court held that the shipment from Oakley to Madisonville was an intrastate shipment and in the opinion said:

> "We are not cited to, nor have we found, any cases more favorable to plaintiff's contention than those we have discussed. Neither of these cases is on all fours with the instant case. In the three water carriage cases the shipments could

not move beyond the port in question except in interstate or foreign commerce. In none of the cases cited was an actual deliverey to the consignee, previous to reshipment, made or attempted. In at least two of the cases a lack of such delivery is emphasized. None of them involved the feature of making payment of actual demurrage charges for delay before reshipping. In one of them, as we have seen, the absence of payment or tender of such charge was commented upon, and in another the fact of the actual allowance of additional free time because of the nature of the shipment. All of them seem to have turned, expressly or impliedly upon the question of continuity of movement, actual or constructive.

"Is the instant case distinguished from the cases cited? The petition contains, as we have seen, an express averment of defendants' order for the delivery of the cars to them at Oakley, an implied averment of such delivery there on the team tracks, express averments of demurrage charges for detention thereof, the receipt by defendants of the lumber at Oakley, and a subsequent reshipment to Madisonville—prima facie indicating a physical possession taken by defendants at Oakley; the mere fact that removal of the lumber from the cars at Oakley was not required does not impress us as enough to convert, as matter of law, an otherwise actual delivery into one merely constructive, colorable or evasive. Considering the petition as a whole, we think its

natural construction is that while defendants intended ultimately to receive and use the lumber at Madisonville, and so to reship from Oakley, yet the latter point was regarded by both parties as the ultimate destination and place of delivery of the particular shipment itself, as distinguished from the ultimate destination of the lumber. There is no averment of a rebilling while the lumber was in transit, nor that any of the shipments were or could have been handled, after rebilling at Oakley, in the same train which brought them into Cincinnati, so making an actually continuous shipment, as in the Kanotex case. Indeed, the petition, by necessary implication, negatives a continuous movement in fact. The fact that defendants obtained switching from Cincinnati to Oakley does not indicate that they were getting something for nothing. The switching was not 'free;' the charge therefor was merely absorbed in the rates from the southern point to Cincinnati.

"A new shipment by a consignee of an interstate shipment in the cars in which received to other points of destination does not necessarily establish continuity of movement or prevent reshipment to a point within the same state from having an independent and intrastate character. Gulf, Colorado & S. F. Ry Co. v. Texas, 204 U. S. 403, 27 Sup. Ct. 360, 51 L. Ed. 540—the Texarkana case; C. M. & St. P. Ry. Co. v. Iowa, 233 U. S. 334, 343, 34 Sup. Ct. 592, 58 L. Ed. 988. In the former of these

cases it was held that the interstate shipment (in that case carload lots) on reaching the point specified in the original contract of transportation ceased to be an interstate shipment, and that its further transportation to another point within the same state, on the order of the consignee, is controlled by the law of the state and not by the interstate commerce act. In the other case it was held that shipments of coal when reshipped after arrival from points without the state (and acceptance by the consignees) to points within the state on new and regular billing forms constituted intrastate shipments and were subject to the jurisdiction of the state railroad commission. We have not overlooked the fact that in the Texarkana case the consignee did not have full title to and control of the shipment until its arrival at the point of reshipment; nor that in the Iowa case the point beyond which the coal was to be shipped was not determined until after its arrival at the point where the reshipment occurred. In the Ohio Railroad Commission case, supra, the Texarkana case was expressly distinguished upon the ground that 'there a new and independent contract for intrastate shipment was made, the interstate transportation having been completely performed.' It was similarly distinguished in the Sabine Tram Company case, supra (227 U. S. 130, 33 Sup. Ct. 229, 57 L. Ed. 442)—citing the language just quoted—as well as in others of the cases we have discussed. But neither of these two cases has been overruled or criticized."

Defendant in this case had a right to rely upon its contract of shipment with the consignor, which covered carriage only from the point of origin on defendant's line to Kerry.

The mental purpose of the consignor to make arrangements with the S. P. & S. for shipment from Kerry to points outside the State of Oregon could not and should not change the terms of the contract which the defendant had with the consignor. As said in Southern Pacific Co. vs. State of Arizona, 249 U. S. 472:

> "The mere intention of the shipper to ultimately continue his tour beyond the State of Arizona did not convert the contemplated intrastate movement into one that was interstate."

To the same effect are N. Y. Central R. Co. vs. Mohney, 252 U. S. 152; Gulf, C. & S. F. Ry. Co. vs. Texas, 204 U. S. 403; Settle vs. B. & O. S. W. R. Co., 249 Fed. 913.

The case of Pacific Coast Ry. Co. vs. U. S., 173 Fed. 448, which is an opinion of this Court, is strongly relied upon by the plaintiff in error as being controlling of the case at bar. The two cases, however, are not similar, the main and controlling difference being that in some instances freight under consideration in that case was billed by the consignor from the point of shipment in another state direct to a

station on the line of the defendant road and in those instances where these were not the facts, the consignor arranged with the Southern Pacific Co. as his agent to rebill the shipments to the point of destination on the defendant's line of road. Judge Gilbert, in discussing the character of the shipment, said, on page 452:

> "The plaintiff in error argues that the decision of the Court below rests upon the false premise that to render services to one who is engaged in interstate commerce is to engage in that commerce. But to our view it rests upon a broader basis than this. It rests upon the fact that the movement of the consigned goods to their ultimate destination from the point at which they were shipped in another state was in part conducted upon the road of the plaintiff in error, and that the interstate character of the shipment did not end until the transportation had reached its ultimate completion. The road of the plaintiff in error became a connecting carrier by virtue of the agreement between the consignor and the first carrier, whereby the latter undertook to deliver the goods at San Jose en route to their ultimate destination."

With all due respect to this Court, we believe that under the authorities of the Supreme Court above cited, the above quoted statement goes too far to be a correct exposition of the law and particularly in the light of the Iowa coal case, 233 U. S. 334, the Texas

case, 204 U. S. 403, the Arizona case, 249 U. S. 472, and the Mohney case, 252 U. S. 152.

The office of the defendant at Kerry was not one continuously operated night and day under the Hours of Service Act. The great preponderance of the evidence in the case shows that the office was operated from 7:00 in the morning until about 8:00 or 8:30 in the evening and hence even if the defendant was engaged in interstate commerce on the days in question, the dispatcher Nash was not on duty over thirteen hours, which is permitted by the statute. All that the statute requires is that the dispatcher be not permitted to work over the required number of hours of service in a 24-hour period. They need not be consecutive hours of work. This is expressly decided in U. S. vs. Achison, Topeka & S. F. R. Co., 220 U. S. 37.

Nash was not even on duty over thirteen hours and was actually working either in his capacity as a dispatcher or as a seller of tickets, a much shorter period of time during each day.

If it is held in this case that the defendant was engaged in interstate commerce, then it is very evident that every common carrier in the United States is an interstate carrier. There is no railroad in the country over which some merchandise is not transported that has either come from without the state

or that is ultimately destined for points beyond the state line, and if so, each and all of these carriers are subject to the Hours of Service Act, the Safety Appliance Act, the Interstate Commerce Act and all other acts of Congress affecting interstate carriers. We cannot believe that under the constitution and the acts of Congress this was intended or can be so. The fact that the defendant, as an accommodation to the logging camps on its line, carried the mail up from Kerry and brought the mail from points on the line down to Kerry without receiving any compensation therefor, has no bearing on the question involved in this case. The mail was all directed to Kerry and was mailed from Kerry. Express was handled the same as the freight shipments, all express being billed to and from Kerry.

For the reasons above set forth the judgment of the Trial Court should be affirmed.

Respectfully submitted,

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